IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4653 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JETPUR MUNICIPALITY

Versus

SAURASHTRA EMPLOYEES UNION

Appearance:

1. Special Civil Application No. 4653 of 1999

MR RR TRIVEDI for Petitioner No. 1

MRS DT SHAH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 15/12/2003

ORAL JUDGEMENT

Heard learned advocate Mr. R.R.Trivedi for petitioner and learned advocate Mrs. D.T.Shah appearing on behalf of respondent.

2. The Petitioner-Jetpur Municipality has challenged the award passed by the Industrial Tribunal, Rajkot in Reference I.T. No. 119 of 1995 dated 18.12.1998 wherein, Industrial Tribunal, Rajkot has granted the benefit of permanency to Narendra Punjabhai Dhadhal and Ashish Mansukhlal Dave, Octroi Clerks w.e.f. 1.11.1995 and, whatever the benefits are available, same are granted in favour of the workmen.

3. Initially, this Court has issued rule and notice to interim relief which was made returnable on 18.11.1999 by order dated 28.10.1999. Thereafter this Court has passed an order granting the ad interim relief in favour of the petitioner on 13.01.2000. Affidavit-in-reply has been filed by the respondent which is on record.

4. The brief facts of the present petition are as under.

4.1 Before the Tribunal, vide Exhibit-2, statement of claim was filed by the Union. The two workmen were appointed on 15.2.1991 and 9.4.1991. Both were treated as daily rated employees and therefore, the industrial dispute is raised by the Union to regularise their service and pay regular salary considering the length of service rendered by both of them. During the pendency of reference, an interim relief application was filed and Tribunal has granted interim relief in favour of them. Thereafter, vide Exhibit-8, reply was filed by the Municipality pointing out that both the workman were working as daily rated employees and accordingly the wages have been paid to both of them and, as and when they require them, their service will continue as they were not appointed on following due process of law. The financial position of the Municipality is also not good so they are not able to do even development work. In short, submission of petitioner-Municipality is that both the workman were allowed and engaged by the Municipality being back door entry and, therefore, they are not entitled the benefit of permanency. Vide Exhibits-9 and 30, two orders were produced in respect of these two workman by the Union. Thereafter vide Exhibit-11 one Narendrakumar Punjabhai Dhadhal was examined before the Tribunal. He deposed before the Tribunal that he was appointed on 9.4.1991 being an Octroi Clerk and he was remained continued in service and each year he completed 240 days continuous service. He is B.Com and is qualified to the post of Clerk. His case was that junior employees have been confirmed but these two workman have not been made permanent by the Municipality. According

to the workmen, Municipality has given three months order and thereafter again while keeping gap of 3-4 days, three months order was given. Even during these 3-4 years gap, the work was taken by the Municipality. The oral interview of the workmen was taken by the Municipality. But, as no post was vacant in the set up the workmen were not made permanent. The similar deposition was made by one Ashish Mansukhlal Dave vide Exhibit-10 who was also cross-examined by the Municipality. Thereafter vide Exhibit-51 one Octroi Supervisor Madhavji Lilabhai Vaghasia was examined. He deposed before the Industrial Tribunal that both the workmen were required to work under him and because they obtained interim order of fixed time, have not been served to the respondent workmen. Both the workmen have been appointed after not following the due process of law and there is no vacancy available in the set up. The financial condition of the Municipality is also not good and no dispute about date of appointment of these two workmen namely 15.2.1991 and 9.4.1991. The said witness also admit that work of Octroi is day-by-day increasing and these workmen are working in a similar nature as the permanent employees are working in Octroi department. The work of both the workmen is found to be satisfactory and both are possessing the requisite qualification. Thereafter, Tribunal has considered that in each interval of three months the Municipality has given order of three months appointment while keeping gap of 3-4 days continuously from 1991. Therefore, Tribunal has considered the said break being an artificial break just to create a situation that workmen were not in continuous service. Therefore, Tribunal has examined the definition under Section 25(B) of the Industrial Disputes Act. After considering the definition of Section 25(B) of the Act and considering the working days of both the workmen Tribunal has come to the conclusion that in the year 1995 both the workmen have completed more than 240 days continuous service. Then they are entitled atleast protection under Section 25(F) of the Act. Thereafter, Tribunal has considered the deposition of Mr.Madhavji Lilabhai Vaghasia who was witness of the Municipality, wherein, he deposed that both the workmen were working under him and Octroi work is day by day increasing in the Municipality and nature of work is similar to the permanent employees. Not only that, but the work of these two workman was found to be satisfactory and both are possessing requisite qualification for the post of Octroi Clerk. The Tribunal has observed that the said deposition of the witness of the Municipality is indirectly favouring the workmen. Therefore, the Tribunal has considered that both the workman have

sufficiently produced necessary documents to the satisfaction of the Tribunal and now only question is whether both the workmen are entitled benefit of permanency from which date. This aspect has been examined by the Tribunal. Ultimately, considering the financial condition of the Municipality, Tribunal has considered that, up to 28.10.1995 both the workmen were remained in service by periodical order of three months and from 1.11.1995 if these workmen are made permanent and accordingly benefit of Periodical appointment is granted this will meet the ends of justice between the parties. Accordingly final order has been passed by the Tribunal.

5. Learned advocate Mr.R.R.Trivedi has vehemently submitted that the workman who has not been appointed after due process of law or by oral interview and without calling the name from the employment exchange, he is not entitled to be made permanent and no such direction can be issued by the Tribunal against the Municipality. He also submitted that when there is no vacancy available in the set up then even Tribunal cannot pass such orders granting the benefit of permanency in favour of two workman. He also submitted that financial condition of the Municipality is also not properly appreciated by the Tribunal. Therefore, on these three grounds, the order passed by the Tribunal is bad and Tribunal has committed gross error in passing such order. Except that, no other submission has been made by learned advocate Mr. R.R.Trivedi before this Court and no other documents have been produced by Mr. Trivedi before this Court.

6. Learned advocate Mrs. D.T.Shah appearing on behalf of the workmen has submitted that the contention of back door entry raised by the Municipality before this Court. No such contention was raised by Municipality before the Tribunal. She also emphasized that in guise of creating artificial break, ultimately, the appointment order has been issued by the Municipality. So, it was not a case of fraud committed by the workmen to obtain the appointment by adopting legal means. On the contrary, a clear appointment has been given in favour of both the workmen by the Municipality by periodical order of three months by keeping break of 4-5 days. Therefore, she submitted that both the workmen were remained in service from 1991 to 1995 and, in between there was no gap or break and, therefore, both the workmen are entitled the benefit of permanency which was rightly granted by the Tribunal. She also submitted that it is a clear admission on the part of the witness of the Municipality that nature of work which has been performed

by both the employees is similar to the permanent employees. She submitted that principle of 'equal pay for equal work' is applicable in this case. Therefore, on this ground also, both the workmen are entitled benefit of permanency which is rightly granted by the Tribunal. She also submitted that the Tribunal has considered the financial condition of the Municipality and, that is how, no retrospective benefit has been granted in favour of the workmen from the date of appointment but, benefit has been granted w.e.f. 1.11.1995. The said fact is examined by the Tribunal in last paragraph of the award and ultimately benefit has been granted w.e.f. 1.11.1995. Therefore, learned advocate Mrs. Shah has submitted that Tribunal has rightly considered and appreciated the matter. Now, this Court cannot reappreciate the evidence which has already been appreciated by the Tribunal. Therefore, according to her submission, no error has been committed by the Tribunal while passing such award which require any interference by this Court while exercising powers under Article 227 of the Constitution of India.

7. I have considered the submission made by both the learned advocates. I have perused the award passed by the Industrial Tribunal, Rajkot. The Tribunal has rightly appreciated the oral evidence as well as documentary evidence placed on record by the parties. It was not in dispute between the parties that appointment orders have been issued by the Municipality in favour of the workmen without following the due process of law. Who has prevented the Municipality at the relevant time to follow the procedure; no answer to that. Who has given the backdoor entry and who has permitted to allow the two workmen in service; no answer to that also. The back door entry has been allowed and recognised for a period of four years and, even no steps have been taken by the Municipality to terminate the service of such employee who remained continued in service. Their work is found satisfactory. Now, to raise contention, being a technical aspect of the matter that these two workmen were not appointed by due process of law, this is nothing but unnecessary contention raised by the Municipality as there is no case on merits. It is also not the case that some unauthorised person has given appointment to these two workmen. The meaning of 'backdoor entry' is not specified by the Municipality. Once the appointment order has been given for a period of three months, it cannot be said that it is a back door entry of the workmen in service. Both the workmen satisfied the requirement of requisite qualification for the post in question. The work of these workmen was found

satisfactory as deposed by witness of the Municipality. The nature of work performed by these two workmen is similar to the work performed by the permanent employees. Tribunal has rightly relied upon the oral evidence of the witness of the Municipality who has admitted certain things that satisfied the status of two workmen. The vacancy is not available in the Municipality, the Tribunal is not bound by such facts because Tribunal is having a power to change the condition of service and even impose new conditions of service. This view has been taken by this Court in the case of KALOL MUNICIPALITY & ANOTHER V. SHANTABEN KALIDAS & OTHERS, 1993 (2) GLR 997.

8. The contention raised by Mr. Trivedi that Tribunal having no jurisdiction to grant the benefit of permanency when there is no vacancy available in set up of Municipality. The contention raised by Mr. Trivedi has been considered by the Division Bench of this Court in the case of KALOL MUNICIPALITY & ANOTHER (Supra). The relevant observations made in paragraph 15 and 16 are quoted as under:

15. Here reference may be made to an unreported decision of Division Bench (Coram: J.B.Mehta, J. & T.U.Mehta, J. as he then was) of this Court in the case of Savarkundla Municipality in Special Civil Application No. 351 of 1976 decided on April 26, 1976. In that case dispute was raised on behalf of 46 daily-rated safai kamdars claiming similar benefits as given to other permanent workmen. The Tribunal found that all the 46 workmen had completed more than 240 days of service, but gave direction to the Municipality to confer benefit of permanency to 30 daily-rated workmen, and also directed the Municipality to revise its set up of 105 workmen by increasing its strength to 135. This part of the award was challenged before this High Court inter alia contending that the Tribunal had no jurisdiction to pass such award in view of the provisions of Sec. 271 of the Municipal Act. Negativing the contention the Division Bench observed as follows:

"These provisions of the Municipal Act operate in a totally different field when the Municipality as an employer unilaterally wants to lay down the service conditions of its employees. Those provisions would have no operation

> where the industrial adjudication arises under a reference made by the Government under the Industrial Disputes Act, 1947 where on such an industrial dispute the Tribunal has jurisdiction to revise the old service conditions, statutory or otherwise, and to make new service contracts for the benefit of the employees in so far as it is just and proper for the industry and it must resolve such an industrial dispute. Therefore, the industrial adjudication always operates in this special field and accordingly, when such service conditions are altered by a legal industrial settlement or award, in those cases the provisions of the Municipal Act which provide for a voluntary fixation or alteration of the service conditions at the instance of the employer would not be applicable."

The Division Bench further observed that on publication of the award in Government Gazette it becomes final and binding to the parties as provided under Sec. 17A of the I.D. Act. The Division Bench also observed that the employer could not contend that it has its difficulties under the Municipal law, because the Municipal law would apply when the Municipality on its own without any industrial settlement or adjudication by the Tribunal unilaterally wants to change its service conditions by framing proper rules under that law.

16. In the case of Natvarlal V. Patel v. Municipality of Vadodara, reported in (1965) VI GLR 189, the question arose as to whether the settlement arrived at between the workmen and the Municipality in conciliation proceedings would be binding upon the Municipality or not. It was contended that unless the settlement was approved by the Commissioner as provided under Sec. 46(a) of the Bombay District Municipal Act, 1901 it would not be binding to the Municipality, in as much as the settlement altered the existing rules [Sec. 46(a) of the Bombay District Municipal Act, 1901 was analogous to Sec. 271 of the Municipal Act]. Negativing the contention the Division Bench observed that the Municipal Act does not deal with the sphere of industrial

dispute which is occupied by the I.D. Act. Initially when the first contract of employment was made or the initial rules were made the matter would be governed by Municipal Act. After the workmen raised industrial dispute for changing their existing conditions of employment, the matter would be entirely governed by the I.D.Act which provides for settlement of industrial disputes by changing, modifying or altering the existing conditions of service whether under a contract or under a rule. Once the dispute is raised the matter would be governed by the Industrial law. Thereafter the Division Bench has observed as follows:

"The two fields are thus totally distinct and the two Acts operate in different fields. The Labour Court was, therefore, obviously in error in coming to the conclusion that when an industrial settlement was arrived at, what was sought to be done was an alteration of the Municipal Rules. Whether the settlement was arrived at was required by law will have to be examined only from the provisions of the Act and not by recourse to Sec. 46 of the Municipal Act which deals with alteration of Municipal Rules and which does not deal with any industrial dispute."

9. The said aspect has also been examined by Andhra Pradesh High Court in the case of INDIAN BANKS ASSOCIATION v. WORKMEN OF SYNDICATE BANK & OTHERS, 1998 (1) LLJ 233. The relevant observations made in paragraph 8 are quoted as under:

"The next question of the reference being bad as in the guise of a reference the respondents were claiming modification of the terms of the agreement is also misconceived. It is well known, as a part of the jurisdpurdence applicable to the industrial law, that Industrial Tribunals are vested with the jurisdiction of also modifying the contract of service and in the process may entitle the workmen to better rights and facilities. The question was considered by the Apex Court in Co-operative Central Bank Limited v. Additional Industrial Tribunal, A.P. AIR 1970 SC 245 with the observation: "The jurisdiction which is granted to Industrial

Tribunal by the Industrial Disputes Act is not the jurisdiction of merely administering the existing laws and enforcing existing contracts. Industrial Tribunals have the right even to vary contracts of service between the employer and the employees which jurisdiction can never be exercised by a civil Court or a Registrar acting under the Co-operative Societies Act, so that the circumstance that, in granting relief on issue No.1, the Tribunal will have to vary the special bye-laws framed by the Co-operative Bank does not lead to the inference that the Tribunal would be incompetent to grant the reliefs sought in this reference. In fact, the reliefs could only be granted by the Industrial Tribunal and could not fall within the scope of the powers of the Registrar dealing with a dispute under Section 61 of the Act."

10. The contention raised by learned advocate Mr. Trivedi that Municipality is a weak Municipality and there is a financial constraint and its financial decision is not good. Therefore, granting the benefit of permanency w.e.f. 1.11.1995 the Municipality has to suffer financially. The said aspect has been examined by the Apex Court in the case of CHIEF CONSERVATOR OF FORESTS AND ANOTHER V. JAGANNAH MARUTI KONDHARE, AIR 1996 SC 2898.The relevant observations made in paragraph 28 and 29 are quoted as under:

28. In so far as the financial strain on State exchequer is concerned, which submission is sought to be buttressed by Shri Dholakia by stating that in the Forests Department itself the casual employees are about 1.4 lacs and if all of them were to be regularised and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighbourhood of Rs.300 crores a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorem. We have neither been impressed by the first nor frightened by the second inasmuch as we do not intend that the view to be taken by us in these applies should apply, propriovigore, to all casual labourers of the Forests Department or any other Department of the Government.

29. We wish to say further that if Shri

> Bhandare's submission is taken to its logical end, the justification for paying even minimum wages could wither away, leaving any employer, not to speak of model employer like the State, to exploit unemployed persons. To be fair to Shri Bhandare it may, however, be stated that the learned counsel did not extend his submission this far, but we find it difficult to limit the submission of Shri Bhandare to payment of, say fair wages, as distinquished from minimum wages. We have said so, because if a pay scale has been provided for permanent workmen that has been done by the State Government keeping in view its legal obligations and must be one which had been recommended by the State Pay Commission and accepted by the Government. We cannot deny this relief of permanency to the respondents-workmen only because in that case they would be required to be paid wages meant for permanent workers. This right flows automatically from the relief of regularisation to which no objection can reasonably be taken, as already pointed out. We would, however, observe that the relief made available to the respondents is not one which would be available ipso facto to all the casual employees either of the Forests Department or any other Department of the State. Claim of casual employees for permanency or for higher pay shall have to be decided on the merits of their own cases.

11. There is also clear admission of the Municipality that day-by-day the work of octroi is increasing in Municipality. The deposition of the witness must be either in the year 1996 or in the year 1997. At that time, the octroi work was continued in Municipality. Therefore, Tribunal has examined the existing position and considered the evidence of the witness of the Municipality that work of Octroi is day-by-day increasing in Municipality which require the employees to work in the Municipality. Municipality is a State authority within the meaning of Article 12 of the Constitution of India. If the workmen have been appointed for a period of three months and continued to work even for more than four years, then it amounts to unfair labour practice adopted by the State authority. In fact, if they have worked, then they should have to follow the procedure in accordance with law. Not to follow the procedure is not a fault on the part of the workmen but it is fault on the part of the Municipality. For that workmen should not have to suffer. Therefore, once the workmen are remained

in service for more than four years by periodical order of three months with the gap of 3-4 days, this is nothing but a State authority has acted in arbitrary manner just to see that workmen may not get legal right to become permanent with the Municipality. Such approach on the part of the Municipality has rightly been deprecated by the Tribunal. The Tribunal has therefore, granted the relief in favour of the workmen. Both the workmen were satisfactorily working with the Municipality. As per deposition of the witness of the Municipality, the nature of work performed by them is similar to the permanent employees. The financial condition of the Municipality has rightly been appreciated by the Tribunal and granted the benefit only w.e.f. 1.11.1995 and not from the date of appointment in the year 1991. Therefore, according to my opinion Tribunal has rightly appreciated oral as well as documentary evidence as read and produced before the Tribunal by the respective parties. A cogent reason has been given in support of its conclusion. The finding given by the Tribunal is not baseless or perverse and a right approach of the Tribunal in granting the benefit in favour of two workmen w.e.f. 1.11.1995. Therefore, according to my opinion, Tribunal has not committed any error while passing the said award in favour of the two workmen. This Court having limited jurisdiction under Article 227 of the Constitution of India. This Court cannot act as an appellate authority. This Court can only order if there is any prima facie error committed by the Tribunal. The real challenge is not the decision but decision making process and in process no error has been committed by the Tribunal. Therefore, according to my opinion, Tribunal has rightly decided the matter in accordance with the settled principle of law laid down by the Hon'ble Apex Court and for that no error has been committed by the Tribunal and therefore, there is no need to require any interference by this Court while exercising the power under Article 227 of the Constitution of India. Hence, there is no substance in the present petition. Accordingly, present petition is dismissed. Rule is discharged. Ad interim relief, if any, stands vacated.

12. Learned advocate Mr. R.R.Trivedi has requested to this Court to continue the interim order which has been passed by this Court on 13.1.2000 for a further period of three weeks. It is necessary to note that the award is passed by the Tribunal on 18.12.1998 and published on 8.3.1999 and order has been obtained from this Court on 28.10.1999 i.e. after 7 months and ultimately, this Court has granted interim relief on 13.1.2000 in between nothing happened with the

Municipality and no steps have been taken by the workmen against the Municipality. Considering this aspect, according to my opinion request made by Mr. Trivedi cannot be accepted and same is rejected.

Direct service is permitted.

(H.K.Rathod,J)
Jayanti*